

1 ARIZONA DEPARTMENT OF FINANCIAL INSTITUTIONS

2 In the Matter of the Escrow Agent License of:

3 No. 09F-BD009-BNK

4 **LENDER'S FIRST CHOICE AGENCY, INC.**
5 3803 Parkwood Blvd., #100
6 Frisco, TX 75034

**SUPERINTENDENT'S FINAL
DECISION AND ORDER**

Respondent.

7 The Superintendent of Financial Institutions (the "Superintendent") having reviewed the
8 record in this matter, including the Administrative Law Judge Decision attached and incorporated
9 herein by this reference, adopts the Administrative Law Judge's Findings of Fact, Conclusions of
10 Law and Order as follows:

11 **ORDER**

12 IT IS ORDERED that Respondent's Escrow Agent License Number EA 0905637 is
13 revoked effective as of the date of this Order.

14 IT IS FURTHER ORDERED that a civil money penalty in the amount of twenty thousand
15 dollars (\$20,000.00) under A.R.S. § 6-132, a late fee of two thousand two hundred fifty dollars
16 (\$2,250.00) under A.R.S. § 6-816(B), an examination fee in the amount of one thousand three
17 hundred sixty-five dollars (\$1,365.00) under A.R.S. § 6-122(B)(3) is assessed.

18 **NOTICE**

19 The parties are advised that this Order becomes effective immediately and the provisions of
20 this Order shall remain effective and enforceable except to the extent that, and until such time as,
21 any provision of this Order shall have been modified, terminated, suspended, or set aside by the
22 Superintendent or a court of competent jurisdiction.

23
24 DATED this 18th day of November, 2008.

25
26 

27 Felecia Rotellini
28 Superintendent of Financial Institutions

1 ORIGINAL filed this 19th day of
2 Nov, 2008 in the office of:

3 Felecia Rotellini
4 Superintendent of Financial Institutions
5 Arizona Department of Financial Institutions
6 ATTN: June Beckwith
7 2910 North 44th Street, Suite 310
8 Phoenix, Arizona 85018

9 COPY of the foregoing mailed/hand delivered
10 This same date to:

11 Diane Mihalsky, Administrative Law Judge
12 Office of Administrative Hearings
13 1400 West Washington, Suite 101
14 Phoenix, AZ 85007

15 Craig A. Raby, Assistant Attorney General
16 Office of the Attorney General
17 1275 West Washington
18 Phoenix, AZ 85007

19 Robert D. Charlton, Assistant Superintendent
20 Richard Fergus, Licensing Division Manager
21 Mike McGrane, Senior Examiner
22 Arizona Department of Financial Institutions
23 2910 N. 44th Street, Suite 310
24 Phoenix, AZ 85018

25 CT Corporation System, Statutory Agent
26 For Lender's First Choice Agency, Inc.
27 2394 E. Camelback Road
28 Phoenix, AZ 85016

AND COPY MAILED SAME DATE by
Certified Mail, Return Receipt Requested, to:

Jerrold G. Hauptman, Owner
Mercury Companies, Inc.
1515 Arapaho Street
Tower 1, Suite 1400
Denver, Colorado 80202

BY: June Beckwith

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of the Escrow Agent License
4 of:

No. 09F-BD009-BNK

5 **LENDER'S FIRST CHOICE AGENCY, INC.**
6 3803 Parkwood Blvd., #100
7 Frisco, TX 75034

**ADMINISTRATIVE
LAW JUDGE DECISION**

8
9 Respondent.

10 **HEARING:** October 3, 2008 at 9:00 a.m.

11 **APPEARANCES:** The Arizona Department of Financial Institutions appeared
12 through Craig A. Raby, Esq., Assistant Attorney General; Respondent Lender's First
13 Choice Agency, Inc. did not appear.

14 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

15
16 **FINDINGS OF FACT**

17 **BACKGROUND AND PROCEDURE**

18 1. The Arizona Department of Financial Institutions ("the Department") has issued
19 Escrow Agent License No. EA 09056737 to Respondent Lender's First Choice Agency,
20 Inc.

21 2. On August 12, 2008, the Department issued an Order of Summary Suspension
22 and Notice of Hearing to Revoke Respondent's Escrow Agent License ("Notice of
23 Hearing"), which set a hearing on October 3, 2008 at 9:00 a.m. The Notice of Hearing
24 charged violations of A.R.S. §§ 6-832(A) and (B), 6-123(3), 6-837(B), and 6-832(A), which
25 provided cause for revocation under A.R.S. § 6-817(A)(2) and (8), and gave notice of
26 possible assessments of a civil penalty under A.R.S. § 6-132, late fees under A.R.S. § 6-
27 816(B), and an examination fee under A.R.S. § 6-125(B)(4) for the examination that the
28 Department conducted under A.R.S. § 6-122(B)(3).¹

29
30 ¹ The Department's Order also cited A.R.S. § 6-131 as authority for this disciplinary matter. Because that
statute refers to the Department's ability to sue and defend in "actions," which Arizona courts have
determined do not include administrative hearings, the Administrative Law Judge does not use this statute
as authority in her recommendation to the Superintendent of the Department in this matter. See *Simple*
v. Tri-City Drywall, Inc., 172 Ariz. 608, 611-612, 838 P.2d 1369, 1372-73 (App. 1992) (Prevailing party in

3. A hearing was held in the Office of Administrative Hearings, an independent state agency, before the undersigned Administrative Law Judge on October 3, 2008. Although the beginning of the duly noticed hearing was delayed fifteen minutes to allow Respondent additional travel time, it did not appear, through a duly authorized employee or attorney, did not contact the Office of Administrative Hearings to request a continuance or that the time for the hearing be further delayed, and did not present any evidence to defend its license.

4. The Department appeared through its attorney, presented the testimony of its employees Escrow Examiner Mike McGrane and Assistant Superintendent Thomas J. Giallanza and had admitted into evidence thirteen exhibits.

HEARING EVIDENCE

5. Respondent is based in Texas and has branch offices in California, Florida, and Colorado, as well as in Arizona.

6. Respondent is a wholly owned subsidiary of Mercury Companies, Inc. ("Mercury").

7. On May 2, 2007, the Department received Respondent's audited financial statement for the year 2006. The audited financial statement had been due by the end of April 2007 and was late.

8. The Department did not receive any audited financial statement from Respondent for the year 2007.

9. On July 30, 2008, the Department received a copy of an e-mail from Jerrold G. Hauptman, the Chairman of Mercury, which informed Mercury's and its subsidiaries' employees that it would no longer fund operations in Arizona, Texas, and California, effective immediately. Mercury's website conveyed the same information.

10. On July 31, 2008, Mr. McGrane sent a letter via e-mail to Bill Moody, Respondent's president, requesting that Respondent surrender its license under A.R.S. § 6-838. Because the Department was required to conduct an investigation before accepting Respondent's license, Mr. McGrane's letter requested that Respondent provide the following information:

administrative claim before Registrar of Contractors was not entitled to attorney's fees from its opponent under A.R.S. § 12-341.01(A) because administrative hearing is not an "action").

1. A certified copy of the resolution of the escrow agent's board of directors or a verified statement indicating its intent to surrender the escrow agent license.
2. A copy of the final reconciliation for all escrow bank accounts including copies of the reconciliation form, bank statement, outstanding checks list, deposit in transit list, trial balance of escrows and any adjusting entries.
3. A list of escrow bank accounts transferred to buyer with copies of the checks, evidencing the transfer of the escrow funds to buyer.
4. A list of the open and closed escrow account files transferred to buyer.
5. A statement indicating that no escrow business has been accepted since the effective closing date. (July 29, 2008)
6. A copy of the sales agreement between agent and buyer for the sale of the escrow business.
7. A copy of the letter, advising them of the transfer of escrow accounts to the new buyer, sent to the parties of the open escrows.
8. The original escrow agent license.
9. A report of the arrangements made for storage of the closed escrow files. This information should include a list of all the files placed in storage, the location of the files and the name of the person to contact for retrieval.
10. If applicable, final payment to the Arizona Escrow Recovery fund for the last quarter.

11. On July 31, 2008, Mr. Moody responded to Mr. McGrane's e-mail, that "I will be able to print this late in the afternoon and get it back to you." That was the last contact that Respondent had with the Department.

12. On August 4, 2008, Mr. McGrane sent via certified mail additional copies of his letter to Mr. Moody; Hon W. Chan, Senior Vice President and Counsel to Mercury; Mr. Hauptman; Patty Hauptman, the CEO of Mercury; and Walter Fitzsimmons, the CFO of

1 Mercury. The Department received the signed return receipts from the letters that had
2 been addressed to Mr. Chan, Mr. Hauptman, Ms. Hauptman, and Mr. Fitzsimmons.

3 13. Mr. McGrane testified that the Department did not receive a return receipt
4 from the copy of the letter that had been addressed to Mr. Moody. It is possible that he
5 received the letter. Mr. McGrane testified that he figured that, if Mr. Moody had not
6 received a copy of the letter, Mercury's principals would forward a copy to him.

7 14. On August 5, 2008, the Department's Financial Institutions Examiner Thomas
8 C. Fink sent an e-mail to Mercury's CEO Ms. Hauptman, in relevant part as follows:

9 We need to know the status of all escrow records for Arizona
10 Title Agency, Inc., Financial Title Company, Lender's First
11 Choice Agency, Inc., and Security Title Guaranty Co. All of
12 these companies are licensed as escrow agents in Arizona.
13 We have sent a prior letter to you pertaining to the four
14 companies listed above. Please see the attachments to this
15 e-mail for reference. In addition, please respond to the items
16 listed below. As in the letter previously sent, we need this
17 information by 5:00 p.m. August 11, 2008.

- 18 1. Where are the files located? At branch offices and/or
19 central warehouse?
- 20 2. Who will be taking responsibility and custody for the files?
- 21 3. How soon will this take place?
- 22 4. Status of the branch and/or central warehouse lease
23 payments? If files are at any branches or a warehouse
24 are they in jeopardy of being taken by the landlord for non-
25 payment of the lease obligations?
- 26 5. Our department has been receiving several inquiries from
27 vendors regarding checks they have received from
28 Arizona Title drawn on US Bank and the checks have
29 been returned for non-sufficient funds. Would you please
30 provide us with your intentions on honoring these
obligations? Do you have a phone number and contact
person to refer these people to?
6. Please provide the annual audited financial statements for
all of the above companies, or the parent company,
Mercury Companies, Inc. They were required to be
submitted to our department no later than April 30, 2008.

1 15. Mr. McGrane testified that Respondent did not provide any of the requested
2 information. He later found out that First American took over at least some of
3 Respondent's open escrow files. But First American did not provide any of the
4 information that had been requested from Respondent. The Department has not been
5 informed that First American or anyone else has bought Respondent's escrow agent
6 business.

7 16. Mr. McGrane testified that, without the requested information, the Department
8 cannot regulate Respondent or protect the public from escrow agent licensees who hold
9 escrow funds on behalf of customers. Respondent violated Arizona law in failing to
10 provide the requested information.

11 17. Respondent's statutory agent, according to the Arizona Corporation
12 Commission's public access system, is C T Corporation System, at One N. Central Ave.,
13 Phoenix, AZ 85004.

14 18. The Department sent a copy of its Notice of Hearing to Revoke to C T
15 Corporation System via certified mail. The Department received the return receipt, which
16 indicated that C T Corporate System had accepted the certified mail.

17 19. The Department also sent a copy of its Notice of Hearing to Revoke to Jerrold
18 G. Hauptman at Mercury via certified mail. The Department received the return receipt,
19 which indicated that Mercury had accepted the certified mail.

20 20. According to the Arizona Corporation Commission's records, Respondent
21 filed an annual report on April 22, 2008 and its corporate status is current and in good
22 standing.

23 21. Mr. McGrane testified that, although he left many messages calls for
24 Respondent's president, Mr. Moody, he never spoke to Mr. Moody directly. He has
25 determined that Respondent has closed its doors and laid off its employees.

26 22. The Department's Assistant Superintendent Mr. Giallanza has extensive
27 experience in the escrow industry. When he heard that Respondent might close its
28 Arizona operations, he assessed the situation and implemented a plan of action. Mr.
29 Giallanza testified that the Department first attempted to arrange for an orderly surrender
30 of Respondent's escrow agent license.

1 23. After the Department sent out numerous notices and requests for information
2 and received nothing that had been requested from Respondent, Mr. Giallanza testified
3 that it became clear that Respondent presented an immediate threat and that it was
4 necessary to suspend Respondent's escrow agent license to protect the public. Mr.
5 Giallanza testified that it was critical that the Department obtain information on
6 Respondent's escrow operations because, unless the Department can reconcile
7 Respondent's escrow accounts, it may be weeks, months, or years before the
8 Department learns of any damage caused by Respondent's mishandling or
9 misappropriation of escrow funds held in trust for customers. Without the requested
10 information, the Department cannot reconcile Respondent's accounts.

11 24. Mr. Giallanza testified that the Department is ready, able, and willing to work
12 with Respondent to allow it to close its Arizona business and surrender its license in an
13 orderly fashion. But the Department is completely in the dark about the status of
14 Respondent's accounts. The Department has been forced to use other methods to
15 obtain information, such as contacting Respondent's corporate parent, but even these
16 methods have been unsuccessful. To protect the public safety, the Department has no
17 choice but to revoke Respondent's license.

18 25. Mr. Giallanza testified that Arizona law allows the Department to impose a
19 civil penalty in the amount of \$5,000 per day per violation. Respondent has committed
20 two major violations: (1) It has failed to provide an updated audited financial statement for
21 the year 2007; and (2) It has failed to provide the information and documents that the
22 Department has requested. Mr. Giallanza testified that, at a minimum, Respondent
23 should be assessed a civil penalty in the amount of \$20,000, or \$10,000 per violation,
24 although the Department could seek more.

25 26. Mr. Giallanza testified that the Department also assessed an examination fee
26 of \$1,365.00 against Respondent.

27 CONCLUSIONS OF LAW

- 28 1. This matter lies within the Department's jurisdiction.²

29
30

² See A.R.S. § 6-121 *et seq.*

1 2. The copies of the notice of the hearing that the Department mailed to
2 Respondent at its address of record, its statutory agent of record, and to its parent
3 corporation were reasonable and Respondent is deemed to have received notice of the
4 hearing.³

5 3. The Department bears the burden of proof and must establish Respondent's
6 statutory violations by a preponderance of the evidence.⁴ "A preponderance of the
7 evidence is such proof as convinces the trier of fact that the contention is more probably
8 true than not."⁵

9 4. A preponderance of the evidence is "[t]he greater weight of the evidence, not
10 necessarily established by the greater number of witnesses testifying to a fact but by
11 evidence that has the most convincing force; superior evidentiary weight that, though not
12 sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair
13 and impartial mind to one side of the issue rather than the other."⁶

14 5. The Department has established that Respondent failed to answer the Notice
15 of Hearing and that, therefore, under A.A.C. R20-40-1209(D), the Superintendent may
16 deem Respondent to have admitted all of the Notice of Hearing's factual allegations and
17 charged violations. The Department has also established by a preponderance of the
18 evidence each of the factual allegations and charged statutory violations in the Notice of
19 Hearing.

20 6. The Department has established that Respondent violated A.R.S. § 6-832(A)
21 and (B) by failing to file its audited financial statements for the year ending on
22 December 31, 2007 with the Superintendent on or before April 30, 2008.

23 7. The Department has established that Respondent violated A.R.S. §§ 6-
24 123(3) and 6-837(B) by failing to provide to the Department all information requested by
25 the Department's letter of August 4, 2008.

26 8. Under A.R.S. § 6-817(A)(8), Respondent's failure to furnish information
27 required by statute is a ground to revoke its license.

28 ³ See A.R.S. §§ 41-1092.04; 41-1092.05(D); 41-1061(A).

29 ⁴ See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119; see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372,
249 P.2d 837 (1952).

30 ⁵ Morris K. Udall, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁶ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 9. Under A.R.S. § 6-817(A)(2), Respondent's failure to comply with statutes
2 governing escrow agents is an additional ground to revoke its license.

3 10. Especially in view of Respondent's failure to present any evidence in
4 defense of its license, the Department has also established that imposition of a civil
5 penalty in the amount of twenty thousand dollars (\$20,000.00) under A.R.S. § 6-132 is
6 appropriate.

7 11. The Department has also established that it is appropriate to assess
8 Respondent a late fee of two thousand two hundred fifty dollars (\$2,250.00) under
9 A.R.S. § 6-816(B), constituting a fee of twenty-five dollars (\$25.00) a day for ninety
10 days past the April 30, 2008 deadline for filing an audited financial statement for the
11 year ending December 31, 2007.

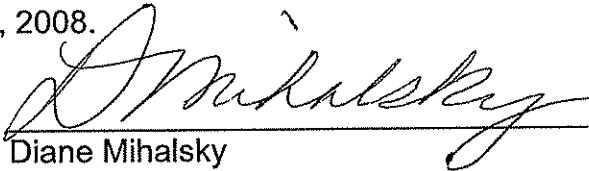
12 12. Pursuant to A.R.S. § 6-125(B)(4), the Department has also established that
13 it is appropriate to assess an examination fee in the amount of one thousand three
14 hundred sixty-five dollars (\$1,365.00) under A.R.S. § 6-122(B)(3), which equals sixty-
15 five dollars (\$65.00) for every hour that the Department's employees spent attempting
16 to examine Respondent.

17 **RECOMMENDED ORDER**

18 Based on the foregoing, it is recommended that the Superintendent of the
19 Department revoke Respondent Lender's First Choice Agency, Inc.'s Escrow Agent
20 License No. EA 0905637.

21 It is further recommended that the Superintendent assess Respondent a civil
22 penalty in the amount of twenty thousand dollars (\$20,000.00) under A.R.S. § 6-132, a
23 late fee of two thousand two hundred fifty dollars (\$2,250.00) under A.R.S. § 6-816(B),
24 and an examination fee in the amount of one thousand three hundred sixty-five dollars
25 (\$1,365.00) under A.R.S. § 6-122(B)(3).

26 Done this day, October 21, 2008.

27 
28 Diane Mihalsky
29 Administrative Law Judge

30 Original transmitted by mail this
23 day of October, 2008, to:

1 Arizona Department of Financial Institutions
2 Felecia A. Rotellini, Superintendent
3 ATTN: Susan Longo
4 2910 N. 44th Street, Suite 310
5 Phoenix, AZ 85018

6 By Chris Finkler